IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. BEAM DISTILLING CO.,
Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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No. 89-680

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have consented to the filing of the brief. Petitioner has denied consent.

The *amici* are organizations whose members include state, county, and municipal governments and officials

throughout the United States. They have a compelling and continuing interest in the issue presented here: whether retroactive monetary relief must be made available whenever a state tax is held unconstitutional. As this Court itself has noted, its jurisprudence under the Commerce Clause and other provisions of the Constitution that may restrict state taxing authority is at times confusing and unpredictable; that problem is compounded by the changing nature of many state economies, which poses novel problems for state and local taxing authorities. These factors make it inevitable that state and local taxing schemes, even when enacted in good faith reliance on standing precedents of this Court, occasionally will be held unconstitutional. If refunds are compelled in such circumstances, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds.

Because the issues presented by this case are of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of respondents.

Respectfully submitted,

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August 29, 1990

QUESTION PRESENTED

Whether the rule set out in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should be applied retroactively.

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INTEREST OF THE *AMICI CURIAE*

The interests of the *amici* are set forth in the motion accompanying this brief.

STATEMENT

1. In 1938, shortly after ratification of the Twenty-first Amendment, Georgia adopted the predecessor to the tax at issue in this case, O.C.G.A. § 3-4-60 (Michie 1982). See 1937-38 Ga. Laws (Ex. Sess.) 103. In relevant part,

the statute taxed alcoholic beverages imported from out-of-state at higher rates than similar products manufactured in-state. The tax immediately was challenged on Commerce Clause grounds; it was upheld by the Georgia Supreme Court, which relied on this Court's interpretation of the Twenty-first Amendment. *Scott v. Georgia*, 2 S.E.2d 65, 66 (Ga. 1939) (citing *Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1939); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)), overruled on other grounds, *Blackston v. Georgia Dep't of Natural Resources*, 334 S.E.2d 679 (Ga. 1985). In the form challenged here, the statute imposed a tax of $1.00 per liter on distilled spirits, and $1.40 per liter on alcohol, imported into the State; it imposed a tax of $.50 per liter on distilled spirits, and $.70 per liter on alcohol, manufactured in Georgia from Georgia-grown products. O.C.G.A. § 3-4-60 (Michie 1982).

In 1985, in response to this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which invalidated a similar Hawaii liquor tax, Georgia repealed the 1982 version of O.C.G.A. § 3-4-60 and replaced it with a direct tax on the importation of liquor. 1985 Ga. Laws 665, O.C.G.A. § 3-4-60 (Michie Supp. 1989). This tax also was challenged and upheld by the Georgia Supreme Court; this Court dismissed the subsequent appeal for want of a properly presented federal question. *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), app. dismissed, 483 U.S. 1013 (1987). The constitutionality of the post-*Bacchus* tax is not at issue here.

2. In 1985, petitioner brought suit in state court, challenging the constitutionality of the 1982 version of O.C.G.A. § 3-4-60 under the Commerce and Equal Protection Clauses, and seeking refunds for taxes paid in 1982, 1983, and 1984. Applying *Bacchus*, the trial court concluded that the statute had violated the Commerce Clause because "the purpose of [the tax], as it existed

during the years in question, was economic protectionism." Pet. App. Ex. C, at 9. The court went on to hold, however, that its decision would be applied only prospectively. Looking to the three-part test for retroactivity set out by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the trial court concluded that its decision "establishes a new principle of law." Pet. App. Ex. C, at 14. The court also noted that "the offending statute was amended in 1985 to remove its Constitutional infirmities and no effort will be made hereafter to assert its validity by defendants"; the court added that retroactive application of its decision would have "'unjust results.'" *Ibid.* (citation omitted). The court accordingly found that petitioner was not entitled to a refund. *Id.* at 15-16.

On appeal, the Georgia Supreme Court agreed both that the tax had been unconstitutional (Pet. App. Ex. A, at 2) and that the holding of unconstitutionality should be given only prospective effect. The court noted that it had adopted the *Chevron Oil* test for retroactivity. *Ibid.* The first prong of the test was satisfied here, the court explained, because a decision striking down the tax in 1984 "would certainly have overruled past precedent"; the court added that, "[d]uring the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional." *Id.* at 3. The Court found that there was no need to address the second prong of the *Chevron Oil* test because the challenged statute had been repealed in 1985. *Ibid.* Finally, the court concluded that the equities made retroactive application of its decision inappropriate, explaining that the State had collected the taxes "in good faith under an unchallenged and presumptively valid statute." The court also noted that "[p]rospective application would avoid imposing a severe financial burden on the State and its citizens." *Id.* at 4.[1]

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[1] Justice Smith dissented from the retroactivity holding on state law grounds, criticizing the majority for "rely[ing] on United

SUMMARY OF ARGUMENT

1. This case presents the issue that divided the Court in *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323 (1990) ("*ATA*"); the dispositive question here is whether to follow the approach to retroactivity propounded by the *ATA* plurality or the *ATA* dissent. In our view, the plurality's analysis—which uses the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine the retroactive applicability of decisions announcing new rules—is preferable. That approach accords with what had been the general understanding of the Court's retroactivity decisions, and is derived from longstanding principles of *stare decisis*. The plurality's conclusion also draws substantial support from the Court's refusal to apply new constitutional decisions in habeas corpus proceedings, which involves a recognition that the policies of finality and reliance may justify disregard of "current constitutional law." *Mackey v. United States*, 401 U.S. 667, 686 (1971) (opinion of Harlan, J.).

Similar considerations militate against the retroactive application of new constitutional principles in cases involving state taxation. Requiring refunds when the invalidated tax had seemed consistent with this Court's precedents could have profoundly disruptive effects on States and the public. It also would subject state courts and taxing officials to extraordinarily awkward and conflicting obligations. State courts are obligated to apply this Court's decisions until the Court itself sets them aside, while state officials typically are bound to enforce presumptively valid laws until directed otherwise by the courts; if States may be forced to surrender funds collected pursuant to such statutes, the ability of governments to plan and carry out their operations will be seriously compromised.

States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered." Pet. App. Ex. A, at 12.

2. Under the *Chevron Oil* test, the decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should not be applied retroactively. The Court in *Bacchus* noted early decisions under the Twenty-first Amendment that supported the constitutionality of the challenged tax (see *id.* at 274-275 & n.13); the Court's decision left very little of those precedents standing. Indeed, three Justices were of the view that the Court's decision in *Bacchus* was inconsistent with a "square[]" contrary holding and rested on "a totally novel approach" to the Twenty-first Amendment. *Id.* at 282, 286-287 (Stevens, J., dissenting). That is enough to dispose of this case: if three Justices believe that a decision of the Court departs from longstanding precedent, state legislators and taxing officials hardly can be faulted for failing to anticipate that decision.

In any event, a review of this Court's holdings makes clear that *Bacchus* did set out a new principle of law within the meaning of the first prong of the *Chevron Oil* test. The Court's earliest Twenty-first Amendment opinions squarely held that Commerce Clause restrictions do not apply to state taxation or regulation of liquor that is destined for consumption within the taxing State's borders. Until the time of the decision in *Bacchus*, the Court continued to affirm that principle, and repeatedly cited its early decisions with apparent approval. Georgia accordingly was entitled to rely on those decisions—which were, of course, the basis for the state Supreme Court's 1939 holding that the challenged tax was constitutional. The outcome under the second and third prongs of the *Chevron Oil* test is equally clear. As the *ATA* plurality explained, constitutional policies are not advanced by retroactively invalidating a tax that, when enacted and enforced, was consistent with this Court's precedents. Similarly, the equities cut powerfully against unsettling actions taken in good faith reliance on this Court's decisions.

ARGUMENT

THE RULE ANNOUNCED BY *BACCHUS* SHOULD NOT BE APPLIED RETROACTIVELY.

At the outset, it is useful to bear in mind the issues that are *not* involved in this case. *First*, the Court need not address the extent to which States may assert sovereign immunity to bar constitutional claims brought against them in their own courts under state causes of action. Despite petitioner's hints to the contrary, however, it is worth noting that the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations. From its inception, our system has recognized sovereign and implied immunities—some created by this Court—that may make it impossible for injured parties to obtain money damages.[2] This understanding plainly survives the Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), which held that the Due Process Clause obligates States to provide a remedy for the collection of unconstitutional taxes; because the State had waived its immunity, the Court in *McKesson* specifically declined to address the extent to which restrictions on such waivers may limit the relief available. See *id.* at 2257 n.34. Given Georgia's broad waiver of immunity, the issue similarly is not present here. See O.C.G.A. § 48-2-35(a).

Second, this case does not involve any challenge to the established understanding that refunds are unavailable

[2] While the specific question whether a State's sovereign immunity may bar federal constitutional claims advanced against it in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911). See also, *e.g.*, *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Cunningham v. Mason & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

to taxpayers who fail to comply with state statutes of limitations or rules requiring notice, payment under protest, or exhaustion of administrative remedies. Petitioner seemingly acknowledges the force of this principle (Br. 41-42), which was reaffirmed in *McKesson*. 110 S.Ct. at 2254-2255 & n.28. See also, *e.g.*, *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S.Ct. 688, 700 (1990); *Ward v. Love County*, 253 U.S. 17, 22-23, 25 (1920).[3] There is no novelty to this conclusion: the Court has made clear in a variety of settings that preservation of a federal constitutional claim may be conditioned on compliance with nondiscriminatory state procedural rules. *See, e.g.*, *Swaggart*, 110 S.Ct. at 700; *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). Similarly, this case does not pose the question whether a State must provide a refund remedy if it allows taxpayers to contest the imposition of a tax prior to payment. See *McKesson*, 110 S.Ct. at 2250-2251 & n.21.

Third, this case is not controlled by *McKesson*. The Florida tax there at issue was enacted *after* this Court's decision in *Bacchus*, see 110 S.Ct. at 2243, and the levy accordingly was inconsistent with settled law from the outset. See *id.* at 2247 n.15; *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2332 (1990) (*"ATA"*). Although petitioner struggles mightily to confuse the issue (see Br. 5-8, 15, 18), this case, in contrast, involves a statute enacted *prior* to the decision in *Bacchus*. See Pet. Br. 32-33. Petitioner's attacks on Georgia's post-*Bacchus* statute—the constitutionality of which already

[3] Similarly, there is no need to address the question whether a State's retroactivity rule ever may be viewed as a limit on its waiver of sovereign immunity that is defined by state law. The Georgia Supreme Court here expressly applied the retroactivity rule set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), see Pet. App. Ex. A, at 2, and it therefore "is eminently clear that the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'" *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2330 (1990) (plurality opinion), quoting *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

has, in any event, been settled (see *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), app. dismissed, 483 U.S. 1013 (1987))—therefore are beside the point.

In fact, the controlling precedent here is *ATA* rather than *McKesson*, and the dispositive question is whether to apply the approach to retroactivity taken by the *ATA* plurality or the *ATA* dissent. The plurality, of course, was of the view that decisions announcing new rules do not "appl[y] to conduct or events that occurred before the date of the decision" (110 S.Ct. at 2330 (plurality opinion)), explaining that retroactivity in such circumstances is governed by "the *Chevron Oil* test." See *id.* at 2331, referring to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The dissent concluded that the Court must apply its current understanding of the law in every case, but that the relief available under that law may be limited. See *ATA*, 110 S.Ct. at 2347-2348 (Stevens, J., dissenting).

In many cases this disagreement is of only theoretical importance, since a decision to withhold relief will have the same effect on the parties regardless of the underlying rationale. See *ATA*, 110 S.Ct. at 2347-2348 (Stevens, J., dissenting). That is not so here, however, for under *McKesson*, "[o]nce a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered." *Id.* at 2339 (plurality opinion). See *McKesson*, 110 S.Ct. at 2247. Similarly, the disagreement between the *ATA* plurality and dissent is of relatively little practical importance—even in tax cases where *McKesson* applies—when the plurality's test leads to retroactive application of the decision at issue. See *Ashland Oil, Inc. v. Caryl*, 110 S.Ct. 3202, 3204 (1990) (per curiam). Again, however, that is not the case here; as we explain below, *Bacchus* plainly set out a new principle of law within the meaning of the *ATA* plurality opinion. As a consequence, the *ATA* plurality's approach would not require the State to offer a retroactive remedy

here, while the dissent's rule would "obligate[] the State to provide meaningful backward-looking relief." *McKesson*, 110 S.Ct. at 2247. We therefore turn to the controlling question in this case: whether to view retroactivity "as a choice of law rule [or] * * * as a remedial principle." *ATA*, 110 S.Ct. at 2348 (Stevens, J., dissenting).

A. The Court Should Apply The *Chevron Oil* Test In Determining Whether New Principles Of Law Control The Case Before It.

Not surprisingly, we are of the view that the *ATA* plurality's approach better accords both with this Court's precedents and with the general understanding of retroactivity. The issues were addressed at length by the Court in *ATA*, and we will not rehearse the arguments here. In our view, however, several points bear special emphasis.

1. As an initial matter, whether or not the *ATA* dissent's characterization of retroactivity is, strictly speaking, consistent with the Court's prior holdings, that characterization does not appear to accord with the Court's past understanding of its decisions. The Court's civil retroactivity rulings typically contain language indicating that "the decision will not apply" to past conduct, or that "we will apply our decision in this case prospectively." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). See also, *e.g.*, *Chevron Oil*, 404 U.S. at 106-107 ("'a holding of nonretroactivity'"); *Phoenix v. Kolodziejski*, 399 U.S. 204, 214 (1970) ("[o]ur decision in this case will apply only to" specified conduct); *Lemon v. Kurtzman*, 411 U.S. 192, 199-200 (1973) (*"Lemon II"*) (plurality opinion) (contrasting retroactivity with remedy). This sort of language—stating that "a decision will not apply" to past conduct— surely is most naturally read as meaning that the *rule* announced in that decision will not apply. Indeed, Justice Harlan wrote separately in *United States v. Estate of Donnelly*, 397 U.S. 286, 295-297 (1970) (Harlan, J., concurring), precisely because

he was concerned that the Court's opinion pointed in the direction taken by the *ATA* plurality. See *id.* at 295. The lower courts, practitioners,[4] and commentators therefore uniformly have understood the Court's retroactivity decisions to be "a doctrine or set of rules for determining when past precedent should be applied to a case before the court." *ATA*, 110 S.Ct. at 2340 (plurality opinion). See *id.* at 2340 & n.2 (citing commentary). There is no compelling reason to depart from this long-settled understanding.

2. This is particularly so because there is no Article III or other constitutional defect in the *ATA* plurality's approach. Perhaps the Court's most oft-quoted statement on the subject is its declaration that " 'the federal constitution has no voice upon the subject' of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982), quoting *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)), and the Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." *Williams v. United States*, 401 U.S. 646, 651 (1971) (plurality opinion). See also, *e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 622 n.3 (1965). There undeniably is, moreover, a real controversy between the parties in a case such as this one. And a holding of nonretroactivity is hardly advisory; the Court's opinion in such a case simply explains its rationale for choosing a

[4] The petitioners in *ATA* and *McKesson*, for example, grounded virtually their entire arguments on the assumption that the *Chevron Oil* test controlled the retroactive applicability of *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), and *Bacchus*, respectively. See *ATA*, No. 88-325, Pet. Br.; *McKesson*, No. 88-192, Pet. Br. They repeated these arguments in their briefs on reargument in *McKesson*. While the *ATA* petitioners briefly suggested that a departure from *Chevron Oil* was possible, they did so by offering a policy-based standard that would require governmental entities always to make full recompense for constitutional violations; they did not advocate the analysis subsequently adopted by the *ATA* dissent. See No. 88-325, Pet. Br. 12-13.

particular rule and applying that rule (or failing to apply it) to particular facts. A ruling of that sort is similar in principle to, and relies upon the same considerations of policy as, a conclusion that a prior holding was wrongly decided but should not be overruled so as to protect the litigants' (and the public's) reliance interests. See, *e.g.*, *Flood v. Kuhn*, 407 U.S. 258, 282-284 (1972).

In fact, as the *ATA* plurality explained, principles of nonretroactivity long have been understood to be an element of the doctrine of *stare decisis*. 110 S.Ct. at 2340-2341, citing *Sunburst*, 287 U.S. at 364 (Cardozo, J.), Certainly, if it is appropriate for the Court to protect the public's expectation interests by declining to overrule a decision that is thought to have been wrongly decided, it is equally proper to allow courts, by means of prospective overruling, "to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *ATA*, 110 S.Ct. at 2341 (plurality opinion). Justice Scalia offered a related analysis in *ATA*, where he concluded that a Justice who disagrees with a decision that overruled precedent may decline to apply that decision to conduct that had been undertaken in reliance on the precedent; in such circumstances, *stare decisis* principles permit a departure from the more recent decision so as not to "upset * * * settled expectations." *Id.* at 2345 (Scalia, J., concurring in the judgment) (emphasis omitted). We add only that, if Justice Scalia's understanding of *stare decisis* is correct—and we believe it is—it is not at all clear why it should be inconsistent with the judicial role for a judge who *agrees* with a decision to decline to apply that decision's rule so as to protect those same expectation interests.[5]

[5] As in *ATA*, use here of "civil retroactivity principles does not result in the unequal treatment of similarly situated litigants." 110 S.Ct. at 2342 (plurality opinion). As also was true in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), see *ATA*, 110 S.Ct. at 2337, 2342 (plurality opinion), the Court in *Bacchus* simply held the challenged tax unconstitutional and remanded the

This conclusion draws substantial support from the Court's application of retroactivity in habeas corpus proceedings. Prior to the Court's decision in *Linkletter*, "the criteria applied in federal habeas corpus proceedings were uniformly the constitutional standards in effect at the time of those proceedings, regardless of when the conviction was actually entered." Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 78 (1965). See, *e.g.*, *Sanders v. United States*, 373 U.S. 1, 17 (1963). But the Court has since seemingly adopted an approach, first propounded by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion of Harlan, J.), that accords most constitutional decisions nonretroactive effect in habeas proceedings. *Teague v. Lane*, 109 S.Ct. 1060, 1075 (1989) (plurality opinion). See *id.* at 1079 (White, J., concurring in part and concurring in the judgment); *ibid.* (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 1079-1080 (Stevens, J., concurring in part and concurring in the judgment).

This approach rests, in part, on the purposes of habeas. See *Teague*, 109 S.Ct. at 1072 (plurality opinion); *Mackey*, 401 U.S. at 682 (opinion of Harlan, J.). But any suggestion that the Court's analysis was compelled by congressional intent plainly would be a fiction. Instead, the Court avowedly has relied on the policies of finality and reliance, concluding that they " 'outweigh * * * the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.' " *Teague*, 109 S.Ct. at 1072 (plurality opinion), quoting *Mackey*, 401 U.S. at 682-683 (opinion of Harlan, J.). See *Teague*, 109 S.Ct. at 1073-1075; *Shea v. Louisiana*, 470 U.S. 51, 58-60 (1985); *Solem v. Stumes*, 465 U.S. 638, 651-653 (1984) (opinion of Powell, J.). Indeed, these policies have been held to justify the conclusion that "otherwise identically situated defendants may be subject to different constitutional rules." *Shea*, 470 U.S. at 63-64 (White, J., dissenting). See *Griffith v. Kentucky*, 479 U.S. 314, 329-332 (1987) (White, J., dissenting). Again, if such considerations may justify disregard of "current constitutional law" in habeas proceedings (*Mackey*, 401 U.S. at 686 (opinion of Harlan, J.)), there is no reason to find it inconsistent with the judicial function for a judge, looking to similar policies, to decline to apply current law in a case such as this one.

case for a determination whether retroactive relief would be appropriate. See 468 U.S. at 277.

3. In fact, there are compelling considerations that militate against retroactive application of new constitutional principles in cases involving state taxation. The *ATA* plurality properly noted that retroactivity may "have potential disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans." 110 S.Ct. at 2333. Petitioner therefore demonstrates a profound misunderstanding of the fiscal realities facing state and local governments by cavalierly suggesting that Georgia finds it "inconvenient" to pay refunds and "could simply issue 'credit memos' to those with valid refund claims." Br. 42. In a time of almost universal budget deficits, it is hardly a simple matter for a state or local government suddenly to make unexpected outlays (or make up for unexpected revenue shortfalls) of many millions of dollars.[6]

[6] Not surprisingly, petitioner fails to acknowledge that, in cases involving discrimination under the Commerce Clause, *McKesson* gives States the option of retroactively raising the taxes of taxpayers who received unconstitutionally favorable treatment in lieu of paying a refund to the disfavored group. See *McKesson*, 110 S.Ct. at 2252. But this is not a complete answer to concerns about the disruptive consequences of retroactive liability. In many cases retroactive tax increases will be impracticable; in others, refunds will be mandatory because the invalidated tax "was beyond the State's power to impose" or the taxpayers were "absolutely immune from the tax." *Id.* at 2251. And even when practical and permis-

Pointing to just this consideration, Justice Powell, writing for five Justices in *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1106-1107 (1983), explained the untoward consequences of imposing retroactive monetary liability on a State. Noting that "the cost [of retroactive relief in *Norris*] would fall on the State of Arizona," and that "[p]resumably other state and local governments also would be affected directly" by the Court's decision, the Court concluded: "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased." Because the illegality of Arizona's conduct had not been settled until the decision in *Norris* itself, the Court saw "no justification * * * to impose this magnitude of burden retroactively on the public." *Ibid.* See *id.* at 1110 (O'Connor, J., concurring).

Even beyond the immediate fiscal impact, retroactive application of new rules in such circumstances would subject state officials to extraordinarily awkward and conflicting obligations. State legislators hardly can be expected to repeal tax statutes that are consistent with standing precedents of this Court. And even if those precedents have been called into question by subsequent decisions, the Court has made clear that "the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-1922 (1989). As a consequence, in a case such as this one

> a state supreme court would have every reason to consider itself bound by [this Court's] precedents to uphold the tax against a constitutional challenge. Similarly, state tax collection authorities would have been justified in relying on state enactments valid under then-current precedents of this Court, particularly where, as here, the enactments were upheld by the State's highest court.

sible, retroactive taxes disrupt the expectations of the taxpayers who are forced to pay them.

ATA, 110 S.Ct. at 2333 (plurality opinion). Indeed, state officials typically are bound under state law to enforce presumptively valid statutes until directed otherwise by the courts. If States may be forced to surrender funds collected pursuant to such statutes, "a government's ability to plan or carry out its programs" will be seriously compromised. *Id.* at 2335.

Other, related considerations reinforce the conclusion that retroactive application of new rules may lead to substantial public harm. In *Lemon II*, the Court rejected a constitutional challenge that

> would have [had] state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, [this] position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers * * * have the power to carry forward the directives of the state legislature.

411 U.S. at 207-208 (plurality opinion). In the absence of compelling constitutional considerations mandating retroactivity (see *id.* at 201-203), the plurality added that "[w]e do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law.'" *Id.* at 208, quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973). While the Court in *Lemon II* was specifically addressing questions of remedy rather than retroactivity, its underlying premise is equally applicable here: "absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon II*, 411 U.S. at 208-209 (plurality opinion).

It is worth adding that, when a state or local government is held liable, the ultimate burden falls not on a wrongdoer but on "the shoulders of blameless or unknowing taxpayers" (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) in the form of higher taxes or reduced benefits—or, given strapped state treasuries, both. When the government has acted in disregard of clearly established law, that outcome may be appropriate. But "because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *ATA*, 110 S.Ct. at 2333 (plurality opinion).

B. Under The *Chevron Oil* Test, The Decision In *Bacchus* Should Not Be Applied Retroactively.

If the Court follows the approach set out by the *ATA* plurality, it must apply the *Chevron Oil* test to its holding in *Bacchus*. The test's three parts have become familiar:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, * * * we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation. Finally, we [must] weigh[] the inequity imposed by retroactive operation, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-107 (citations and internal quotation marks omitted). See *ATA*, 110 S.Ct. at 2331 (plurality opinion). Applying this test, the *ATA* plurality concluded that the Court's decision in *American Trucking*

Ass'ns, Inc. v. Scheiner, 483 U.S. 366 (1987)—which had largely overruled the so-called *Aero Mayflower* line of cases [7]—should not be applied retroactively. See 110 S.Ct. at 2332-2334. Application of the test to *Bacchus* should lead to the same result.

1. *Bacchus* involved a challenge to a Hawaii statute that gave preferential tax treatment to certain locally produced alcoholic beverages. See 468 U.S. at 265-266. The five Justices in the majority concluded that the statute was inconsistent with the Commerce Clause because it discriminated against out-of-state products. *Id.* at 268-273. More important for present purposes, the Court also held that the state law was not saved by the Twenty-first Amendment. The Court did note "broad language in some of the opinions of this Court written shortly after ratification of the Amendment" that precluded application of the Commerce Clause to state liquor regulations. *Id.* at 247; see *id.* at 274 n.13, citing *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). But citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Court concluded that "the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Bacchus*, 468 U.S. at 275; see *id.* at 275-276.

The Court therefore held that,

> [d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. * * * State laws that constitute mere economic protectionism are

[7] *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

> therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry."

468 U.S. at 276 (citation omitted). The Court accordingly invalidated the tax because it was inconsistent with the Commerce Clause and was "not supported by any clear concern of the Twenty-first Amendment." *Ibid.*

Justice Stevens, joined by then-Justice Rehnquist and Justice O'Connor,[8] issued a vigorous dissent, suggesting that the constitutionality of the Hawaii law was "squarely" settled by this Court's precedents. 468 U.S. at 282. Noting that the State in *Bacchus* did not contest Congress's authority to regulate liquor (see *id.* at 279), Justice Stevens explained that the Court's early opinions "immediately recognized that [the Amendment's] broad language confers power upon the States to regulate commerce in intoxicating liquors unconfined by ordinary limitations imposed on state regulation of interstate goods by the Commerce Clause and other constitutional provisions." *Id.* at 281 (citing cases). Justice Stevens added that the Court has "consistently reaffirmed that understanding of the Amendment." *Id.* at 282.

Specifically addressing the argument that Hawaii's tax was unconstitutional because it imposed a burden on liquor produced out-of-state, Justice Stevens concluded that, "[a]s I read the text of the [Twenty-first] Amendment, it expressly authorizes this sort of burden. Moreover, as I read Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization v. Young's Market Co.*, * * * the Court has squarely so decided." 468 U.S. at 282. Justice Stevens also noted that

[8] Justice Brennan did not participate in the consideration or decision of the case. 468 U.S. at 277.

the decision in *Idlewild*, which the Court suggested had qualified the reasoning of *Young's Market*, "merely rejected the broad proposition that the Twenty-first Amendment had entirely divested Congress of all regulatory power over interstate or foreign commerce in intoxicating liquors." *Id.* at 284. Justice Stevens added that the Court's conclusion—that state laws are not protected by the Amendment when they are unrelated to temperance or the perceived evils of traffic in liquor—involves "a totally novel approach to the Twenty-first Amendment." *Id.* at 286-287.

2. In our view, the same factors that the *ATA* plurality found decisive are at work in this case. Indeed, so far as is relevant here, *Bacchus* and *Scheiner* are remarkably similar. In both, the Court noted longstanding precedents that supported the constitutionality of the challenged state tax. See *Scheiner*, 483 U.S. at 293-295; *Bacchus*, 468 U.S. at 274-275 & n.13. In both, the Court pointed to more recent decisions that, it suggested, had called into question the vitality of those precedents. See *Scheiner*, 483 U.S. at 295; *Bacchus*, 468 U.S. at 274-276. In both, the Court's decision left very little (or nothing) of those precedents standing.[9] See generally *ATA*, 110 S.Ct. at 2331 (plurality opinion). And in both, three dissenting Justices argued that the Court's holding was a marked and unwarranted departure from its precedents. See *Scheiner*, 483 U.S. at 298-303 (O'Connor, J., dissenting); *Bacchus*, 468 U.S. at 282-283 (Stevens, J., dissenting). That is enough to dispose of this case: if three Justices of this Court are of the view that a decision is inconsistent with "square[]" contrary holdings (*Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting)) and rests on "a totally novel approach" (*id.* at 286), state

[9] In both, the Court also made rather unenthusiastic attempts to distinguish those precedents. See *Scheiner*, 483 U.S. at 296 & n.26 (noting practical impossibility of precise apportionment in *Aero Mayflower* cases); *Bacchus*, 468 U.S. at 274 n.13 (noting *Young's Market*'s observation that a high import fee may aid in policing liquor traffic).

legislators and taxing officials hardly can be faulted for failing to anticipate that decision.

3. In any event, a review of this Court's holdings makes clear that *Bacchus* did set out a new principle of law. The Court's earliest opinions in cases involving the Twenty-first Amendment flatly held that Commerce Clause restrictions do not apply to state taxation or regulation of liquor. Thus in *Young's Market*—decided, coincidentally, one year after the first of the *Aero Mayflower* line of cases—the Court upheld a fee on liquor imported from other States, explaining that the taxing State's motivation in enacting the fee was irrelevant. 299 U.S. at 63. See *Bacchus*, 468 U.S. at 282-283 (Stevens, J., dissenting).

Subsequent decisions repeatedly and expressly rejected the contention that state laws motivated by economic protectionism are not saved by the Amendment. In *Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939) (Brandeis, J.), for example, a Commerce Clause challenge to the retaliatory exclusion of out-of-state liquor was grounded on the contention that "the [state] law does not relate to protection of the health, safety and morality, or the protection of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it." The Court gave the argument short shrift: "[s]ince that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Ibid.* See also, *e.g.*, *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (Brandeis, J.) ("[s]ince the Twenty-first Amendment, as made clear in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"). These statements were hardly dicta, as petitioner repeatedly asserts (Br. 26, 29); they were essential to the resolution of the only issues presented.

Petitioner suggests (Br. 26, 28-29) that this understanding was disturbed by the decision in *Idlewild*, pointing to the Court's statement that to "draw a conclusion from [the early decisions] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned would * * * be an absurd oversimplification." 377 U.S. at 331-332. The Court made this statement, however, in support of its observation that the Amendment did not divest *Congress* of its power to regulate liquor; the Court immediately added that, "[i]f the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and demonstrably incorrect." *Id.* at 332.

The Court accordingly held that a State's attempt to interfere with federally approved shipments of liquor overseas were not supported by the Amendment. 377 U.S. at 333-334.[10] At the same time, however, the Court, citing *Young's Market*, made clear that "by virtue of [the Amendment's] provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. The Court added that "[t]his view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned." *Ibid.*[11]

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[10] The Court's holding in *Idlewild* actually turned on a principle that predated—and that was entirely consistent with—its rulings in *McKittrick* and *Indianapolis Brewing*: that a State may not prohibit the transportation through its territory of liquor that is destined for consumption elsewhere. See 377 U.S. at 332, citing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

[11] Indeed, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), a decision issued the same day

In subsequent decisions the Court reaffirmed congressional authority to regulate liquor,[12] and suggested that, "[o]*nce passing beyond consideration of the Commerce Clause*, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig v. Boren*, 429 U.S. 190, 206 (1976) (emphasis added).[13] But the Court consistently continued to hold that the "importation of intoxicants [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Id.* at 206-207. It therefore several times affirmed *Idlewild*'s observation that "a State is totally unconfined by traditional Commerce Clause limitations" when restricting the importation of liquor for use within its borders. See *California v. LaRue*, 409 U.S. 109, 114 (1972); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966). And the Court repeatedly cited cases like *Young's Market*[14] and *McKittrick*[15] with apparent ap-

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as *Idlewild*, the Court quoted *Idlewild*'s observation that States are "totally unconfined by traditional Commerce Clause limitations" in restricting the importation of intoxicants for use or distribution within their borders. 377 U.S. at 344. See *id.* at 344 n.4 (citing *Young's Market*). The Court held in *Beam* that a state tax on foreign liquor transactions was inconsistent with the Export-Import Clause, and was not saved by the Twenty-first Amendment, precisely because "what is involved in the present case * * * is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad." *Ibid.*

[12] See *Crisp*; *Midcal*. See also *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 282 n.9 (1972).

[13] See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Cf. *California v. LaRue*, 409 U.S. 109, 116 (1972).

[14] See *Midcal*, 445 U.S. at 107; *Craig*, 429 U.S. at 206-207; *LaRue*, 409 U.S. at 114; *Seagram*, 384 U.S. at 42; *Beam*, 377 U.S. at 344; *Idlewild*, 377 U.S. at 330.

[15] See *Midcal*, 445 U.S. at 108; *Craig*, 429 U.S. at 206; *Beam*, 377 U.S. at 344 n.4; *Idlewild*, 377 U.S. at 330.

proval. Indeed, it did so just eleven days prior to the decision in *Bacchus*, stating that

> "This Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Craig*, [429 U.S. at 206]. Thus, as the Court explained in [*Idlewild*], § 2 [of the Amendment] reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause.

Crisp, 467 U.S. at 712-713, citing *Idlewild*, 377 U.S. at 330, and *Young's Market*, 299 U.S. at 62-63.

Against this background, Georgia plainly was entitled to rely on this Court's pre-*Bacchus* Twenty-first Amendment decisions. Prior to *Bacchus* the Court never had suggested that holdings such as *Young's Market* and *McKittrick* no longer were good law insofar as they authorized state taxation or regulation of liquor intended for domestic use. And the Court never had so much as hinted that protectionist state statutes were outside the scope of the Amendment. Even if the outcome in *Bacchus* had been implicitly foreshadowed by language in some of the Court's earlier decisions—and in our view it had not been—that would not distinguish *Bacchus* from *Scheiner*; the holding in the latter case arguably had been suggested by decisions such as *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). See *Scheiner*, 483 U.S. at 294-295. Indeed, in one significant respect the State's expectation of continuity in the law was considerably stronger here than in *ATA*: taxes such as the one at issue here seemingly were, as Justice Stevens noted in *Bacchus*, "expressly authorize[d]" by the text of the Twenty-first Amendment. 468 U.S. at 282. Cf. *North Dakota v. United States*, 110 S.Ct. 1986, 2001 (1990) (Scalia, J., concurring in the judgment).

Here, the Georgia tax long ago had been challenged and upheld by the Georgia Supreme Court. *Scott v.*

Georgia, 2 S.E.2d 65 (Ga. 1939), overruled on other grounds, *Blackston v. Georgia Dep't of Natural Resources*, 334 S.E.2d 679 (Ga. 1985). That decision expressly relied on holdings of this Court. See *Scott*, 2 S.E.2d at 66, citing *Young's Market* and *Indianapolis Brewing Co.* Those holdings never had been called into question and repeatedly had been cited with approval by this Court. See *ATA*, 110 S.Ct. at 2332 (plurality opinion); compare *Ashland Oil*, 110 S.Ct. at 3205 (retroactivity in order where decision "did not overrule clear past precedent nor decide a wholly new issue of first impression"). In fact, petitioner's assertion (Pet. Br. 33) that the limited scope of the Twenty-first Amendment had long been clear is belied by its own notable failure to challenge Georgia's tax until after the decision in *Bacchus*.[16] *Bacchus* accordingly established a new principle of law within the meaning of the first prong of the *Chevron Oil* test. See *ATA*, 110 S.Ct. at 2332 (plurality opinion).

4. The results of the second element of the *Chevron Oil* test are equally clear. As we have just noted, when enacted and enforced Georgia's tax was consistent with this Court's Twenty-first Amendment doctrine; in such a case, as the *ATA* plurality explained, "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." 110 S.Ct. at 2332. Indeed, the adequacy of prospective relief is particularly apparent in the Commerce Clause setting, because that provision was designed to protect the interstate market rather than individual participants in the market. See, *e.g.*, *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 475 (1981). We argue this issue at length

[16] Petitioner's failure to challenge the tax was not a consequence of its inability to discover the protectionist purposes of the state statute; as the trial court explained, those purposes were announced in the legislative history. Pet. App. Ex. C, at 8-9.

in our brief in *Dennis v. Higgins*, No. 89-1555, now pending before the Court, and do not repeat our discussion of the issue here.[17]

Petitioner's principal response on this point is its assertion that retroactive application of *Bacchus* is necessary as a deterrent to improper state conduct, a contention grounded on the argument that Georgia's post-*Bacchus* statute remains unconstitutional. Br. 38-39. If petitioner were correct in its assessment of that statute, a successful challenge to the *new* tax might well require a retroactive remedy. As we note above, however, petitioner's challenge to the post-*Bacchus* statute was *rejected* by the state courts, and this Court denied review. In any event, the constitutionality of the new tax is beside the point here; it remains true that constitutional values are not advanced by punishing States for actions that, at the time they were taken, were entirely consistent with this Court's dicates.

For reasons that we explain above, the equities also cut powerfully against retroactive application of *Bacchus*. As in *ATA*, "here the State promulgated and implemented its tax scheme in reliance on * * * precedents of this Court." 110 S.Ct. at 2333 (plurality opinion). In such circumstances, "the inequity of unsettling actions taken in reliance on those precedents is apparent." *Ibid.* Petitioner's argument to the contrary (Br. 41-42) turns largely on the wholly insupportable assertion that paying refunds would not be burdensome to the State. The *ATA* plurality rejected an identical contention, and that should dispose of this case. See 110 S.Ct. at 2333-2335.

[17] Copies of our brief in *Dennis* have been served on the parties along with this brief.

CONCLUSION

The judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

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